NO. 46008-4-II

COURT OF APPEALS, DIVISION II

STATE OF WASHINGTON,

Respondent,

vs.

DANIEL M. PIERRE,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR THURSTON COURT
The Honorable Christine Schaller, Judge
Cause No. 12-1-00997-3

BRIEF OF APPELLANT

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02. Whether the to-convict instruction, court's instruction 15, under which Pierre was convicted of felony harassment, was constitutionally defective because it failed to list all of the elements of the crime? [Assignment of Error No. 2].

03. Whether Pierre was prejudiced as a result of his counsel's failure to object to the trial court's to-convict instruction 15 for felony harassment that failed to list all of the elements of the crime? [Assignment of Error No. 3].

04. Whether the trial court erred in giving court's instruction 11 on self-defense that misstated the proper standard under the facts in this case and in failing to to give Pierre's proposed self-defense instructions based on WPIC 17.02 and WPIC 17.04? [Assignments of Error Nos. 4-5].

05. Whether Pierre was prejudiced as a result of his counsel's failure to preserve his objection to court's instruction 11 and in failing to preserve his request for his proposed self-defense instructions or by inviting error? [Assignment of Error No. 6].

C. STATEMENT OF THE CASE

01. Procedural Facts

Daniel M. Pierre was charged by first amended information filed in Thurston County Superior Court October 24, 2012, with assault in the third degree, count I, felony harassment, count II, and

bail jumping, count III, contrary to RCWs 9A.36.031(1)(g), 9A.46.020(1)(a)(i)(2)(b)(iii), and 9A.76.170(1), respectively. [CP 5].

No pretrial motions were filed nor heard regarding either a CrR 3.5 or CrR 3.6 hearing. [CP 8]. Trial to a jury commenced January 21, 2014, the Honorable Christine Schaller presiding.

Pierre was found guilty, sentenced within his standard range and timely notice of this appeal followed. [CP 104-114, 116-18].

02. Substantive Fact

In the late evening of July 24, 2012, Olympia police officers Jason Winner and Kimberly Seig responded to the report of a physical disturbance involving a male and female at a local apartment complex. [RP 47-50, 163].[1] Yelling and screaming could be heard as the officers approached apartment D-304. [RP 48-49, 52]. Winner remembered "primarily hearing a female voice[,]" which he described as "[e]nraged, angry." [RP 52]. When the officers announced their presence and requested the occupants open the door, the apartment went "silent, quickly." [RP 166].

> The silence indicated to us that we knew somebody was in there, so it's like - - it starts to heighten our

[1] Unless otherwise indicated, all references to the Report of Proceedings are to the transcripts entitled Volumes I-III.

> awareness and certainly raises the potential danger of the situation. And it - - after several times knocking, I heard something hit the door - -

[RP 57].

Fearing for the safety of the occupants [RP 149, 166], the officers entered the apartment through the unlocked door and immediately encountered Joseph Musekamp, who complied with instructions to get on the ground, before saying that his cousin and sister were down the hall. [RP 59-61]. Neither officer pointed a weapon at Musekamp. [RP 68]. Roberta Hagoodhenry, Pierre's girlfriend, who looked disoriented, appeared in the hallway [RP 63, 268], and Pierre was located in a bathroom, "taking care of an injury to his face," [RP 71]. When he refused Winner's order to show his hands, a struggle ensued while Winner was "simultaneously trying to holster [his] weapon." [RP 73]. During the encounter, Pierre continually pushed on Winner's chest. [RP 79-81]. "At one point he pushed me so hard that he pushed me into Officer Seig and both of us into the opposing wall." [RP 82]. Prior to securing Pierre's head to the wall, Winner "felt a very hard palm strike on [his] left shoulder." [RP 83]. It was a "solid strike." [RP 84]. Pierre was eventually taken into custody and escorted into the living room, where he was "still angry but very - - very cooperative at that point." [RP 86]. While sitting un-handcuffed on the couch [RP 138]:

> [h]e said, "You don't know who you're messing with." He had made a comment that he would find me on the streets, and he also - - there was one more comment that I found in particular that I remembered that he said if he had hit me, it would have been worse.

[RP 87].

Winner took this seriously:

> Well, because nothing about what we do is private anymore. So I'm pretty easy to find. And he appeared very sincere about it. They gave me no indication that he was not being serious, and he certainly seemed capable of - - of doing it.

[RP 88].

In rebuttal, Winner returned to Pierre's comments:

> He told me he'd beat my ass. He told me he'd find me on the streets, and he didn't care if I had a badge, and that if he'd hit me, it would have been worse.

[RP 451].

Both Hagoodhenry and Musekamp contradicted Winner's testimony, the former saying Winner had first confronted her and Pierre in the bathroom. "He had his gun out of his holster." [RP 277]. "It had a - - um, uh, he had it pointed directed at us. And then I put my hands up. And I was directed out of the bathroom." [RP 278]. She did not see what happened in the bathroom after she left, though she did hear somebody "scuffling." [RP 287]. Musekamp disputed Winner's assertion that he had

not pointed a gun at him, claiming he had before telling him to "get down on the ground or I will shoot you in your effing head." [RP 328]. "I just seen the barrel pointed at me." [RP 348].

Pierre's testimony paralleled critical portions of Hagoodhenry's, while contradicting Winner's most serious allegations. He was in the bathroom with Hagoodhenry and was washing his face after suffering an accidental scratch to his head [RP 374-75] when Winner pushed open the bathroom door: "[H]e had his weapon drawn, pointing at me, told me to turn the fuck around and put my hands up." [RP 377]. Following Hagoodhenry's removal from the room, Pierre turned around slowly and faced Winner, holding a washcloth in his right hand and his contacts in the other. [RP 381]. "I immediately had my hands smacked one after another." [RP 383]. When Winner attempted to grab him by the shoulder, Pierre asked him what he was doing. [RP 385]. From there, the exchange escalated to where Winner pushed Pierre into the wall by his throat. [RP 387]. "He had holstered his pistol, and he used two hands." [RP 390]. Winner then grabbed him by the hair and eventually slammed him into a closet door. [RP 390].

> At the point of him trying to put me to the ground, he - - I remember the female officer trying to calm the situation down. And so I - - I don't recall whether I was all the way to the ground. I know I made it to one knee. And then it was just was a - -

> the situation just kind of dispersed, I guess, you know?

[RP 392].

Pierre was worried that Winner was going to hurt him. He was afraid. "I thought I might pass out." [RP 395]. He explained that he'd previously had facial reconstructive surgery [RP 396], and as a result feared any impact to his face: "I could be blinded." [RP 397]. He said he made the comments while he was on the couch because he was "irate" because the police had come into his house and assaulted him. [RP 399].

Through Deputy Prosecuting Attorney Olivia Zhou, the State introduced the following documents relating to the bail jumping charge: certified copy of Information filed July 27, 2012, charging Pierre with assault in the third degree and felony harassment [RP 229; State's Exhibit 1], certified copy of Conditions of Release signed by Pierre, requiring him to appear before the court within three days' notice [RP 231, 233, 259, 406, 435; State's Exhibit 2], certified copy of Order Continuing Hearing from October 17, 2012 to the following October 24, signed by Pierre, with notice that "[f]ailure to appear will result in a warrant being issued for your arrest and may subject you to further criminal charges()" [RP 234, 414, 436; State's Exhibit 3], and a certified copy of Order for Bench Warrant after Failure to Appear issued for Pierre. [RP 236, 239, 255;

State's Exhibit 4]. Pierre explained that he missed his court date because "I thought it was a Tuesday when it was actually a Wednesday." [RP 414].

D. ARGUMENT

01. THE TRIAL COURT VIOLATED PIERRE'S RIGHT TO A PUBLIC TRIAL BY TAKING CHALLENGES FOR CAUSE AT SIDEBAR DURING JURY SELECTION.

Both the Sixth Amendment to the United States Constitution and art. I, §§ 10 and 22 of the Washington Constitution guarantee criminal defendants the right to a public trial. State v. Russell, 141 Wn. App. 733, 737-38, 172 P.3d 361 (2007), reviewed denied, 164 Wn.2d 1020 (2008); Presley v. Georgia, 558 U.S. 209, 130 S. Ct. 721, 723, 175 L. Ed. 2d 675 (2010). This right is not, however, unconditional, and a trial court may close the courtroom in certain situations. State v. Easterling, 157 Wn.2d 167, 174-75, 137 P.3d 825 (2006). Such a closure may occur only after a proper balancing of competing interests. State v. Bone-Club, 128 Wn.2d 254, 258-59, 906 P.2d 325 (1995). A trial court's failure to conduct the required Bone-Club inquiry "results in a violation of the defendant's public trial rights." State v. Brightman, 155 Wn.2d 506, 515-16, 122 P.3d 150 (2005). In such a case, the defendant need show no prejudice; it is presumed. Bone-Club, 128 Wn.2d at 261-62. Additionally, a defendant's failure to "lodge a contemporaneous objection" at the time

of the exclusion does not amount to a waiver of his or her right to a public trial. Brightman, 155 Wn.2d at 514-15, 517. The remedy for such a violation is to reverse and remand for a new trial. In re Pers. Restraint of Orange, 152 Wn.2d 795, 814, 100 P.3d 291 (2004). This court reviews de novo the question of law of whether a defendant's right to a public trial has been violated. Brightman, 155 Wn.2d at 514; State v. Sublett, 176 Wn.2d 58, 70, 292 P.3d 715 (2012).

In State v. Wilson, 174 Wn. App. 328, 298 P.3d 148 (2013), this court, discussing State v. Paumier, 176 Wn.2d 29, 288 P.3d 1126 (2012), State v. Wise, 176 Wn.2d 1, 288 P.3d 1113 (2012), and Sublett, recognized that our Supreme Court has developed a two-step process for determining whether a particular proceeding implicates a defendant's public trial right:

> First, does the proceeding fall within a specific category of trial proceedings that our Supreme Court has already established implicates the public trial right? Second, if the proceeding does not fall within such a specific category, does the proceeding satisfy Sublett's "experience and logic" test? (footnote omitted).

State v. Wilson, 174 Wn. App. at 335.

Given this court's acknowledgement in Wilson, 174 Wn. App. at 335-40, that the Washington Supreme Court has established that the public

trial right applies to jury selection, Pierre claims the trial court violated his right to a public trial by taking challenges for cause at sidebar during jury selection. See State v. Wise, 176 Wn.2d at 11-12.

The record demonstrates that during the jury selection process several prospective jurors were excused for cause at sidebar:

> THE COURT: Please be seated. I want to go ahead and put the sidebars on the record. During jury selection, we had two sidebars. At the first the first sidebar, we all agreed that Juror No. 25 should be dismissed for cause based upon a health issue that Juror No. 25 described during the course of jury selection briefly.
>
> The defense made a motion to dismiss Number 1 for cause. [The prosecutor] indicated that he would leave it to the court and the court's recollection of what Juror No. 1 indicated. I dismissed Number 1 for cause based upon her statements of being a victim 20 years ago and that it was still affecting her. And then she talked about that and brought it up more than one time during the course of the jury selection process.
>
> There was a second sidebar after jury selection had started, and that was the defense requesting that Juror No. 10 be dismissed for cause based upon the fact that he had disclosed that he was good friends with Office Winner's brother and that Officer Winner's brother was his supervisor. [The prosecutor] objected and indicated that he had not made an unequivocal statement that he could not be fair. I ultimately agreed with [the prosecutor's] argument. I too did not hear a definitive statement, so I denied the request for cause as to Juror No. 10....

[RP 37-38].

In State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), where the issue was whether Love's right to a public trial was violated because the trial court entertained peremptory challenges at the clerk's station, Division III of this court held that the public trial right does not attach to the exercises of challenges during jury selection, reasoning that neither "prong of the experience and logic test suggests that the exercise of cause or peremptory challenges must take place in public." Id. at 920. This court tracked this analysis when confronted with the same issue in State v. Dunn, 180 Wn. App. 570, 321 P.3d 1283 (2014):

> We agree with Division III that experience and logic do not suggest that exercising peremptory challenges at the clerk's station implicates the public trial right.

Id. at 1285.[2]

Pierre respectfully disagrees with this court's decision in Dunn, which relied on Division III's decision in Love, for it is well established that the right to a public trial extends to jury selection. In re Morris, 176 Wn.2d 157, 174, 288 P.3d 1140 (2012) (Chambers, J., concurring). Importantly, our Supreme Court's decisions in Wise and State v. Strode, 176 Wn.2d 58, 292 P.3d 715 (2012), in addition to this court's decision in Wilson, support the claim that peremptory challenges—and by extension

[2] A petition for review was filed in Love under cause no. 89619-4, which was stayed by our Supreme Court on April 4, 2014. Similarly, a petition for review was filed in Dunn on May 7 and is now "Stayed Pending Case" under cause no. 90238-1.

challenges for cause—must be made in open court. In Strode, where "for-cause" challenges were conducted in chambers, the court held this practice violated public trial rights. Strode, 167 Wn.2d at 224, 227, 231.

In Wilson, by noting that the public trial right has not historically encompassed excusals for hardship prior to the commencement of voir dire, Wilson, 174 Wn. App. at 337-39, this court differentiated between such excusals under CrR 6.3 and those "for-cause" and peremptory challenges under CrR 6.4, the latter of which must occur in open court. Id. at 342.

The trial court erred in taking challenges for cause at sidebar during jury selection, outside the public's purview and in violation of Pierre's right to a public trial. See State v. Slert, 169 Wn. App. 766, 774 n.11, 282 P.3d 101 (2012), rev. granted in part, 176 Wn.2d 1031 (2013) (rejecting argument that no public trial violation can occurred where jurors dismissed at sidebar). The error was structural, prejudice is presumed, and reversal is required.

02. THE TO-CONVICT INSTRUCTION UNDER WHICH PIERRE WAS CONVICTED OF FELONY HARASSMENT WAS CONSTITUTIONALLY DEFECTIVE BECAUSE IT FAILED TO LIST ALL OF THE ELEMENTS OF THE CRIME.

A criminal defendant has the right to have the jury

base its decision on an accurate statement of the law applied to the facts of the case. State v. Miller, 131 Wn.2d 78, 90-92, 929 P.2d 372 (1997). It is reversible error to instruct the jury in a manner that relieves the State of its burden of proving every essential element of a criminal offense beyond a reasonable doubt. State v. Pirtle, 127 Wn.2d 628, 656, 904 P.2d 245 (1995). "Jury instructions are sufficient when they allow counsel to argue their theory of the case, are not misleading, and when read as a whole properly inform the trier of fact of the applicable law." State v. Douglas, 128 Wn. App. 555, 562, 116 P.3d 1012 (2005).

A challenge to a jury instruction on grounds that it relieved the State of its burden of proof may be raised for the first time on appeal. RAP 2.5(a)(3); State v. Kyllo, 166 Wn.2d 856, 862, 215 P.2d 177 (2009). This court reviews alleged errors of law in jury instructions de novo. State v. Levy, 156 Wn.2d 709, 721, 132 P.3d 1076 (2006).

The State charged Pierre with violating the criminal harassment statute. RCW 9A.46.020, which provides, in pertinent part:

> (1) A person is guilty of harassment if:
>
> (a) Without lawful authority, the person knowingly threatens:
>
> (i) To cause bodily injury immediately or in the future to the person threatened or to another person.... (emphasis added)

Court's instruction 15 reads in pertinent part:

> To convict the defendant of the crime of harassment as charged in Count II, each of the following elements of the crime must be proved beyond a reasonable doubt:
>
> (1) That on or about July 24, 2012, the defendant knowingly threatened Jason Winner immediately or in the future;
>
> (2) That the words or conduct of the defendant placed Jason Winner in reasonable fear that the threat would be carried out;
> (3) That at the time the threat was made Jason Winner was a criminal justice participant who was performing his official duties;
>
> (4) That the defendant acted without lawful authority....

[CP 80].

The instruction entirely omitted the essential element of a threat to cause bodily injury immediately or in the future, as set forth in RCW 9A.46.020(1)(a)(i). And while it is well-established that instructions must be read together and viewed as a whole–see, e.g., State v. Haack, 88 Wn. App. 423, 427, 958 P.2d 1001 (1997), review denied, 134 Wn.2d 1016 (1998)–a to-convict instruction must provide a complete statement of the elements of the crime charged, for it is the gage by which the jury weighs the evidence to determine a defendant's guilt or innocence. State v. Lorenz, 152 Wn.2d 22, 31, 93 P.3d 133 (2004). "The jury is not required to search the other instructions to see if another element alleged in the

information should have been added to those specified in the 'to convict' instruction." State v. Teal, 117 Wn. App. 831, 838, 73 P.3d 402 (2003), affirmed, 152 Wn.2d 333 (2004) (citing State v. Emmanuel, 42 Wn.2d 799, 819, 259 P.2d 845 (1953)).

Although instructions that relieve the State of its burden to prove every element of the crime charged require automatic reversal, State v. Brown, 147 Wn.2d 330, 339, 58 P.3d 889 (2002), "not every omission or misstatement in a jury instruction relieves the State of its burden." Id. This is not that case. Not only did instruction 15 relieve the State of its burden to prove that Pierre threatened to cause bodily injury to Winner immediately or in the future, it cannot be saved through harmless error analysis, for it cannot be concluded beyond a reasonable doubt that the verdict would have been the same absent the error. Id. at 341.

It is given that the instruction did not provide a complete statement of the elements of the crime of harassment, and the point being made is this: The jury could have reasonably believed that Pierre was merely blowing off steam when he said Winner didn't know who he was messing with or that it would have been worse had he hit Winner. Sure, and he was going to hunt him down and beat his ass. Under instruction 15, such blustering or puffery could have been construed as a threat, but a threat to do what? The instruction was misleading by omission and provided no

guidance or yardstick that the jury could use to answer this question. Also, this: The jury wasn't even instructed to take this step; under instruction 15, there was no predicate for conviction that Pierre threatened to cause bodily injury either immediately or in the future to Winner. And any reference to Court's instruction 13 [CP 79]–the definitional instruction for harassment–to save the day is misplaced, for where a constitutionally required element is treated as a "definition," the State's burden of proof is correspondingly diluted to the point where this court cannot assert that it is convinced beyond a reasonable doubt that the jury would have reached the same verdict had the to-convict instruction included the missing element.

03. PIERRE WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO TO OBJECT TO THE TRIAL COURT'S INSTRUCTION 15 FOR FELONY HARASSMENT THAT FAILED TO LIST ALL OF THE ELEMENTS OF THE CRIME.[3]

A criminal defendant claiming ineffective assistance must prove (1) that the attorney's performance was deficient, i.e., that the representation fell below an objective standard of reasonableness under the prevailing professional norms, and (2) that prejudice resulted from the deficient performance, i.e., that there is a

[3] While it has been argued in the preceding section of this brief that this issue constitutes constitutional error that may be raised for the first time on appeal, this portion of the brief is presented only out of an abundance of caution should this court disagree with this assessment.

reasonable probability that, but for the attorney's unprofessional errors, the results of the proceedings would have been different. State v. Early, 70 Wn. App. 452, 460, 853 P.2d 964 (1993), review denied, 123 Wn.2d 1004 (1994); State v. Graham, 78 Wn. App. 44, 56, 896 P.2d 704 (1995). Competency of counsel is determined based on the entire record below. State v. White, 81 Wn.2d 223, 225, 500 P.2d 1242 (1972) (citing State v. Gilmore, 76 Wn.2d 293, 456 P.2d 344 (1969)). A reviewing court is not required to address both prongs of the test if the defendant makes an insufficient showing on one prong. State v. Tarica, 59 Wn. App. 368, 374, 798 P.2d 296 (1990).

Additionally, while the invited error doctrine precludes review of any instructional error where the instruction is proposed by the defendant, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990), the same doctrine does not act as a bar to review a claim of ineffective assistance of counsel. State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996) (citing State v. Gentry, 125 Wn.2d 570, 646, 888 P.2d 1105, cert. denied, 116 S. Ct. 131 (1995)); RAP 2.5(a)(3).

Should this court determine that counsel waived the issue by failing to object to court's instruction 15, then both elements of ineffective assistance of counsel have been established.

First, the record does not and could not reveal any tactical or strategic reason why trial counsel would have failed to so object to the instruction for the reasons previously argued herein. Had counsel so objected, the trial court would have granted the objection under the law set forth in the preceding section of this brief.

To establish prejudice a defendant must show a reasonable probability that but for counsel's deficient performance, the result would have been different. State v. Leavitt, 49 Wn. App. 348, 359, 743 P.2d 270 (1987), aff'd, 111 Wn.2d 66, 758 P.2d 982 (1988). A "reasonable probability" means a probability "sufficient to undermine confidence in the outcome." Leavitt, 49 Wn. App. at 359. The prejudice here is self-evident for the reasons set forth in the preceding section.

Counsel's performance thus was deficient because he failed to object to court's instruction 15 for the reasons previously agued herein, which was highly prejudicial to Pierre, with the result that he was deprived of his constitutional right to effective assistance of counsel, and is entitled to reversal of his conviction for felony harassment.

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04. THE TRIAL COURT ERRED IN GIVING COURT'S INSTRUCTION 11 ON SELF-DEFENSE THAT MISSTATED THE PROPER STANDARD UNDER THE FACTS IN THIS CASE AND IN FAILING TO GIVE PIERRE'S PROPOSED SELF-DEFENSE INSTRUCTIONS BASED ON WPIC 17.02 AND WPIC 17.04.

"A jury instruction misstating the law of self-defense amounts to an error of constitutional magnitude and is presumed prejudicial." State v. LeFaber, 128 Wn.2d 896, 900, 913 P.2d 369 (1996). This court "will review an alleged error that a self-defense jury instruction misstates the law raised for the first time on appeal." State v. McCreven, 170 Wn. App. 444, 462, 284 P.3d 793 (2012), review denied, 176 Wn.2d 1015 (2013).

The trial court gave, in relevant part, the following self-defense jury instruction patterned after 11 Washington Practice: Washington Pattern Jury Instructions: Criminal 17.02.01, at 257 (3d ed., 2008) (WPIC):

> It is a defense to a charge of Assault in the Third Degree that the force used was lawful as defined in this instruction.
>
> A person may use force to resist a physical direction by a known police officer only if the person receiving the physical direction is in actual and imminent danger of serious injury from an officer's use of excessive force. The person may employ such force and means as a reasonably

prudent person would under the same or similar circumstances. (emphasis added).

....

[CP 78; Court's Instruction 11].

In giving this instruction, the court declined to give the following self-defense instructions[4] proposed by Pierre:

> It is a defense to a charge of assault that the force used was lawful as defined in this instruction.
>
> The use of force upon or toward the person of another is lawful when used by a person who reasonably believes that he is about to be injured in preventing or attempting to prevent a malicious trespass or other malicious interference with real or personal property lawfully in that person's possession and when the force is not more than is necessary.
>
> The person using the force may employ such force and means as a reasonably prudent person would use under the same or similar conditions as they appeared to the person, taking into consideration all of the facts and circumstances known to the person at the time of and prior to the incident.
>
> The State has the burden of proving beyond a reasonable doubt that the force used by the defendant was not lawful. If you find that the State has not proved the absence of this defense beyond a reasonable doubt, it will be your duty to return a verdict of not guilty as to this charge.

[CP 23; WPIC 17.02].

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[4] While the proposed defense instruction were not numbered, the court referred to them as 11-A and 11-B during the instruction conference. [RP 465-66].

> A person is entitled to act on appearances in defending himself, if that person believes in good faith and on reasonable grounds that he is in actual danger of great bodily harm, although afterwards it might develop that the person was mistaken as to the extent of the danger. Actual danger is not necessary for the use of force to be lawful.

[CP 24; WPIC 17.04].

In declining to give these instructions, the trial court stated:

> I find that it would be against public policy for me to give a self-defense instruction that would allow people to disregard orders from law enforcement, even inside their own home, when law enforcement has entered pursuant to their community caretaking function. That would be to tell society, you never need to follow the direction of the police, and you can do whatever you want. And I don't believe that is the standard. I do not believe that would be consistent with Bradley and the cases before that. And I decline to adopt that in this case. Therefore, I will not give instruction 11-A or 11-B….

[RP 478].

In State v. Westlund, 13 Wn. App. 460, 467, 536 P.2d 20 (1975), this court, in addressing the rule to be employed when one seeks to justify the use of force in self-defense against an arresting law enforcement officer, articulated the following: "Orderly and safe law enforcement demands that an arrestee not resist a lawful arrest … unless the arrestee is actually about to be seriously injured or killed." Thus the established rule for the use of force in self-defense cases "involving arrests" requires the person asserting self-defense face a situation of actual, imminent danger.

State v. Bradley, 141 Wn.2d 731, 737-38, 10 P.3d 358 (2000). The rule applies even if the person believes his or her arrest is unlawful. State v. Valentine, 132 Wn.2d 1, 21, 935 P.2d 1294 (1997).

As acknowledged by the trial court:

> Absolutely, this is not a case where Mr. Pierre was placed under arrest. There's no evidence to support that or any argument that he was placed under arrest when his interactions occurred with Officer Winner.

[RP 476-77].

Pierre was not being arrested, lawfully or otherwise. He was in his home. There was no crime being committed. As acknowledged by the court, he was not resisting arrest: "[T]his is not a case where there was resisting arrest." [RP 471]. And the court's "public policy" rationale for giving its instruction 11 and not Pierre's proposed self-defense instructions is misplaced, for "[p]ublic policy is left up to the state legislature." Riksem v. City of Seattle, 47 Wn. App. 506, 511, 736 P.2d 275 (1987). Court's instruction 11 had no place in this case, for it raised the degree of threat in a non-arrest and non-resisting arrest situation to that of actual, imminent danger, and in the process lessened the State's burden to disprove Pierre's claim that he was acting in self-defense, as set forth in his proposed instructions. Court's instruction 11 did not reflect the legal standard of self-defense under the facts in this case, and the trial court

erred in giving it and in declining to give Pierre's proposed instructions on self-defense, which the court characterized as 11-A and 11-B, all of which constitutes error of constitutional magnitude requiring reversal of Pierre's conviction for assault in the third degree.

05. PIERRE WAS PREJUDICED AS A RESULT OF HIS COUNSEL'S FAILURE TO PRESERVE HIS OBJECTION TO COURT'S INSTRUCTION 11 AND IN FAILING TO PRESERVE HIS REQUEST FOR HIS PROPOSED SELF-DEFENSE INSTRUCTIONS OR BY INVITING ERROR.[5]

Pierre's trial counsel clearly objected to Court's instruction 11 and the court's refusal to give his proposed self-defense instructions discussed in the preceding section. [RP 469-474]. However, following a later discussion of whether Court's instruction 11 should include either the language "by someone known by the person to be a police officer" or "by a known police officer [RP 479-480](,)" and a short recess, counsel stated, "at this point, Your Honor, we're accepting the court's language. We think it's appropriate." [RP 481]. This is confusing, given counsel's subsequent argument that defense's preference would be for the language "'by someone known by the person to be a police officer.'" [RP 483]. In any event, should this court determine that Pierre's attorney waived the issues

[5] For the sole purpose of avoiding needless duplication, the prior discussion relating to the test for ineffective assistance of counsel presented earlier herein is hereby incorporated by reference.

regarding his objection to court's instruction 11 and his proposed self-defense instructions, or invited error, then both elements of ineffective assistance of counsel have been established.

The record does not, and could not, reveal any tactical or strategic reason why trial counsel would have so acted, and the prejudice is self-evident for the reasons argued in the preceding section. Reversal is required.

E. CONCLUSION

Based on the above, Pierre respectfully requests this court to reverse his convictions consistent with the arguments presented herein.

DATED this 14th day of August 2014.

Thomas E. Doyle

THOMAS E. DOYLE
Attorney for Appellant
WSBA NO. 10634

CERTIFICATE

I certify that I served a copy of the above brief on this date as follows:

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DATED this 14th day of August 2014.

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Transmittal Letter

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Case Name: State v. Pierre

Court of Appeals Case Number: 46008-4

Is this a Personal Restraint Petition? Yes ■ No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: ____

Answer/Reply to Motion: ____

■ Brief: __Appellant's__

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: ____
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Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

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